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In the

Supreme Court of the United States

October Term 1949

456

No. 456

THE INTERNATIONAL UNION OF UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, C.I.O., ET AL.,

APPELLANTS

v.

GERALD K. O'BRIEN, WAYNE COUNTY PROSECUTING ATTORNEY, AND STEPHEN J. ROTH, ATTORNEY GENERAL OF THE STATE OF MICHIGAN,

APPELLEES

On Appeal from the Supreme Court of the State of Michigan

BRIEF FOR APPELLEES

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Index of Subject Matter

		Page
I.	Opinions Below	1
II.	Jurisdiction	2
III.	Counter-Concise Statement of the Case	3
	1. Defining the Narrow issue here involved	3
	2. Summary of pertinent provisions of Michigan labor mediation act of 1939, prior to 1947	5
	3. Analytic summary of pertinent provisions of Michigan labor mediation law, as amended by Bonine-Tripp Act of 1947	7
	4. Schedule of sections of Labor Management Relations Act, omitted from appellants' Appendix "B"	14
	5. Counter-Statement of Facts and Proceedings in the court below	15
IV.	Questions Presented	23
V.	Preliminary Considerations	24
VI.	Summary of the Argument	25

Page

VII. The Argument 32–50

Point One

Settled practice of this Court narrows the issues in the pending review 32

Point Two

The Michigan statute, a State police measure designed to protect the general public as the forgotten party to such disputes, by discouraging minority strikes, does not conflict with LMRA, a collective bargaining law designed to protect the flow of commerce 43

Point Three

Such a State police measure so designed, does no violence to the due process clause of the Fourteenth Amendment 43

VIII. Conclusion 51

Appendix "A"

Copy of Michigan Labor Mediation Law as amended by Bonine-Tripp Act of 1947 and as it stood when this controversy arose 55

Appendix "B"

Pertinent sections of Michigan Labor Mediation Law, as amended by Act No. 230, Mich. Pub. Acts 1949, effective June 23, 1949, viz., §§ 2(b), 9, 9a, 15, 16, 17, 22 and 24 74

Page

Appendix "C"

Pertinent provisions of Labor Management Relations Act, 1947, viz., §§ 10(a), 14(a), 202(c), 203(a) and (b), and 303(b), supplementing appellants' Appendix "B". 61 Stat. 146, 151, 153 and 158 80

Appendix "D"

Official reports and releases issued by the Michigan Labor Mediation Board 83

Table of Cases Cited

	Page
Algoma Plywood & Veneer Co. v. Wisconsin Board, 336 U.S. 301, 306	41
Allen-Bradley Local v. Board, 315 U.S. 740, 745	27, 42
American Federation of Labor v. American Sash & Door Co., 335 U.S. 538	36, 50
American Power & Light Co. v. SEC, 329 U.S. 90	36
Auto Workers v. Wisconsin Board, 336 U.S. 245, 247-248	3
Bethlehem Steel Co. v. N.Y. State Labor Relations Board, 230 U.S. 767	30, 47
California v. Zook, 336 U.S. 725, 728	6, 25
Case Co., J. I. v. National Labor Relations Board, 321 U.S. 332	43
Chicago Bd. of Trade v. Olsen, 262 U.S. 1; 43	33
Coffman v. Breeze Corporation, 323 U.S. 316, 325	26, 32
Ex Parte Mitsuye Endo, 323 U.S. 283	36
Federation of Labor v. McAdory, 325 U.S. 450, 461	26, 32
Giboney v. Empire Storage Co., 336 U.S. 490	39
Heithmuller v. Stokes, 256 U.S. 359	26, 33

Page

Illinois Central R.R. Co. v. SPUC of Illinois, 245 U.S. 493, 510 ..... 27, 35

International Union, UAW v. Wisconsin Board, 336 U.S. 245 ..... 28, 42, 49

Kelly v. Washington, 302 U.S. 1, 9, 10 ..... 27, 35, 40

Kimball v. Kimball, 174 U.S. 158, 161 33

LaCrosse Tel. Corp. v. Wisconsin Board, 336 U.S. 18 ..... 30, 47

Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 50

Local 170, TWUA, CIO v. Genesee Circuit Judge, 322 Mich. 332 ..... 8, 13

McDowell v. Warden, 169 Mich. 332 4

NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 39

Near v. Minnesota, 283 U.S. 697, 708 33

St. Pierre v. United States, 319 U.S. 41, 42 26

Southern Steamship Corp. v. NLRB, 316 U.S. 31 39

Thornhill v. Alabama, 310 U.S. 88, 103 45

Townsend v. Yeomans, 301 U.S. 441, 454 40

Statutes and Constitutional Provisions Cited

	Page
Mich. Labor Mediation Act, original enactment—Act No. 176, Pub. Acts 1939, §§ 9, 9a, 9b, 9e, 22	3
Mich. Labor Mediation Act as amended, 1949: Act No. 230, Pub. Acts 1949	4
Mich. Bonine-Tripp Act: Act No. 318, Pub. Acts 1947	7
Mich. Comp. Laws 1948, § 4.42, Stat. Ann. (Henderson) § 2.214	4
U.S. Labor Management Relations Act, 1947, 61 Stat. 136; 29 U.S.C. §§ 141-197	3, 6
Section 8(d)	21
Mich. Const. 1908:	
Art. IV, § 2	8
Art. V, § 21	7
Art. VII, § 9	8
U.S. Const.	
Art. 1, § 8, Cl. 3	3

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BRIEF FOR APPELLEES

I

Opinions Below

The opinion of the Supreme Court of the State of Michigan, is officially reported in 325 Mich. 250; it appears un-

officially in 38 N.W. 2d 421; and it is published (121-134) in the printed transcript of record.[*]

The transcript of record also contains the unreported opinion (66-69) of the circuit court for the county of Wayne in chancery.

II

Jurisdiction

We accept appellants' statement of jurisdiction as set forth in their counsel's brief, p. 2.

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[*] Unless otherwise plainly indicated by the context, numbers in parentheses throughout this brief, refer to pages of the printed transcript of record.

III

Counter-Concise Statement of the Case

1

Defining the narrow issue here involved

The litigation below drew in question within a narrow range, the validity of certain "strike-election" provisions of § § 9, 9a, 9b, and 22 of the Michigan labor mediation law as added or amended by the Bonine-Tripp Act of October 11, 1947,[1] the contention being that such sections combined "to transgress constitutional limitations imposed by the Fourteenth Amendment and by the Commerce Clause[2] as implemented by the Labor Management Relations Act of 1947", [3] 61 Stat. 136; 29 U.S.C. § § 141-197.

A close analysis of the challenged "strike-election" provisions of the Bonine-Tripp Act of 1947, will we think disclose that § § 9 and 9a were so radically altered by amend-

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[1]

Properly cited as Act No. 176, Pub. Acts Mich. 1939, § § 9, 9a, 9b, 9e, 22, and others, as added or amended by Act No. 318, Pub. Acts Mich. 1947, effective October 11. This version of the statute will be found in 3 Mich. Comp. Laws 1948, § § 423.1-423.22a. For convenience of the Court we publish the entire text as our Appendix "A", post, pp. 55-73.

[2]

U.S. Const., Art. 1, § 8, Cl. 3, giving the Congress power "To regulate commerce . . . among the several states".

[3]

Paraphrasing the language of this Court's opinion in Auto Workers v. Wisconsin Board, 336 U.S. 245, 247-248.

ment in 1949,[4] that they no longer operate upon appellants in precisely the same manner as they did when the controversy arose in May 1948, and that the penalty clause of § 22 alone survives in original form by virtue of a general law of the State of Michigan which saves it from destruction by such amendment.[5]

The pertinent provisions of § 22, Comp. Laws Mich. 1948, § 423.22, as originally enacted by the Bonine-Tripp Act of 1947, so far as applicable to this cause, are as follows:

> "Sec. 22. Any person who either individually or as one of a group of persons instigates a strike, or who shall call or cause a strike to be placed in effect, . . . *while an election is pending under section 9*, . . . shall upon conviction be punished by a fine of not more than $1,000 or by imprisonment in the county jail for not more than 6 months, or by both fine and imprisonment." [Emphasis supplied].

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[4]

Act No. 230, Mich. Pub. Acts 1949, effective May 31, 1949, amended 12 sections of this act, including those in question, and it added 10 new sections, all of which changed the entire complexion of the statute. The objectionable feature of the election provisions of § 9a were amended to require a majority of those who voted rather than a majority of all the members of the bargaining unit; and the penalty clauses were greatly strengthened. The court below held, 325 Mich. 254, that they were not concerned with the latest amendment to the statute. The pertinent sections as so amended, appear in our Appendix "B", post, pp. 74-79.

[5]

Mich. Comp. Laws 1948, § 4.4a, Stat. Ann. [Henderson] § 2.214, provides: "The repeal of any statute or part thereof shall not have the effect to release or relinquish any penalty, forfeiture, or liability incurred under such statute or any part thereof, unless the repealing act shall so expressly provide, and such statute and part thereof shall be treated as remaining in force for the purpose of instituting any . . . prosecution for the enforcement of such penalty". This applies to amendatory acts as well, McDowell v. Warden, 169 Mich. 332.

Thus it should be noted at the outset that § 22 did not then and does not now penalize a person who instigated a strike, or who called or caused a strike to be placed in effect, *after* the election directed by § § 9 and 9a had been held, and that such a strike could be called with impunity even though the majority voted against it.[6]

2

Summary of pertinent provisions of Michigan labor mediation act of 1939, prior to 1947.

The labor mediation law of Michigan, in its original form, Act No. 176, Pub. Acts 1939, effective June 8, created a board for the mediation of labor disputes, § 3, and prescribed its power and duties, § § 4, 7, 10, 11, 12; it provided for creation of special mediation commissions in disputes involving public utilities and hospitals, § 13; it regulated the conduct of parties to labor disputes, § § 9 and 9a; it protected the rights and privileges of employes, § § 14, 16, including the right to organize and engage in lawful concerted activities, § 8; it recognized certain rights and privileges of employers, § § 15, 17; and though it contained no general penal clause, it provided specific penalties for violation of certain sections.

---

[6] It is our position that when so construed, § 22 as originally enacted by the Bonine-Tripp Act of 1947, which in that form constitutes the only presently-enforcible provision to survive impact of the amendatory statute of 1949 (No. 230), does not violate any constitutional right, nor does it conflict with Taft-Hartley. All questions now suggested which involve other sections of the Michigan labor mediation law, have become moot by virtue of the 1949 amendments. The issue here, though presented and considered below in a somewhat broader aspect, is therefore extremely narrow.

Section 1 of the act, which still stands unamended, declared the general purpose of the law to be as follows:

> "Section 1. It is hereby declared to be the public policy of this State that the best interests of the people of the State are served by the prevention or prompt settlement of labor disputes; that strikes and lockouts and other forms of industrial strife, regardless of where the merits of the controversy lie, are forces productive ultimately of economic waste; that the interests and rights of the consumers and the people of the State, while not direct parties thereto, should always be considered, respected and protected; and that the voluntary mediation of such disputes under the guidance and supervision of a governmental agency will tend to promote permanent industrial peace and health, welfare, comfort and safety of the people of the State".[7]

Further evidence of the broad scope of the act will be found in § 19 the provisions of which stated:

> "Sec. 19. This act shall be deemed an exercise of the police power of the State of Michigan for the protection of the public welfare, safety, prosperity, health and peace of the people; and all provisions of this act shall be liberally construed for the accomplishment of said purpose".[8]

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[7]

Cf. Labor Management Relations Act of 1947, § 1 (b), 61 Stat. 136, 29 U.S.C., Supplement II, § 141 (b), declaring the basic purpose and policy of the Act or Chapter to be promotion of the full flow of commerce. See, California v. Zook, 336 U.S. 725, 728.

[8]

"This section", the Supreme Court of Michigan has said, 294 Mich. 633, "leaves no doubt as to the intent of the legislature to have this act apply to all labor disputes in the state in the interests of the public welfare".

The general scheme of mediation established by the act of 1939 prior to the amendment here in question (1947), was this: In the event of a labor dispute and inability to settle it, no strike or lockout was permissible unless notice were served by the parties upon the board or any member thereof, together with a statement of the issues involved, § 9; then, for a five-day minimum period after service of such notice, it became the duty of the parties to the dispute to mediate and "to use their best efforts to avoid a cessation of employment or a change in the normal operation of the business", a violation of such provisions to be a misdemeanor punishable as such, § 9a; and, after receipt of the notice aforesaid, it became the duty of the board to assist in settlement of the dispute, §10, and to conduct hearings for that purpose, with power to compel the attendance of witnesses, §11.

3

Analytic Summary of pertinent provisions of Michigan labor mediation law, as amended by Bonine-Tripp Act of 1947 [the law here in question]

Act No. 318, Mich. Pub. Acts 1947, the Bonine-Tripp Act, effective October 11 of that year,[9] amended § § 9, 9a and 13 of the Michigan labor mediation act of 1939, *supra*, and it added thereto 9 new sections to stand as § § 9b to 9g, inclusive, 13a, 22 and 22a. The title of the statute was amended to indicate the changes thus effected.[10]

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[9]

The amendatory act was approved July 1, 1947, and under the terms of the State Const. 1908, Art. V, § 21, it became effective Oct. 11, 90 days after final adjournment of the legislature.

[10]

Under the State Const. 1908, Art. V, § 21, no law shall embrace more than one object which shall be expressed in its title.

A clear understanding of the nature of the questions presented, and due appreciation of the restricted issues, seem to require the following analytic summary of the statute as it stood when the appellants on May 12, 1948, claiming the law to be invalid, chose deliberately to violate § 22 thereof by instigating a strike *pending* an election called pursuant to § § 9 and 9a.[11]

The various sections of the Michigan labor mediation law as it then existed, may for the purpose of such analysis be said to fall into six general categories;

(1) those declaring the public policy of the State and the scope of the statute in exercise of the police power, *viz.*, § § 1, 19, and 20;

(2) those creating a state board of mediation and defining the powers and duties of its members, *viz.*, § § 3 to 7, inclusive, 12 and 13a;

(3) those recognizing certain rights of employees and employers, *viz.*, § § 8, 13a, 14, 15, 16 and 17;

(4) those providing both voluntary and compulsory arbitration of labor disputes arising in the conduct and management of public utilities, *viz.*, § § 13 and 13a;[12]

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[11]

It is important to note that the questions which the Court should consider upon this review, do not involve the validity of any penal section which punishes upon conviction the calling or instigation of a strike after an election has been held.

[12]

The Michigan Supreme Court in Local 170, T.W.U.A., C.I.O., v Genesee Circuit Judge, 322 Mich. 332, held the compulsory arbitration provision of § § 13 and 13a invalid because they require a circuit judge to serve as arbitrator, contrary to State Const., Art 4, § 2, and Art. 7, § 9. But this did not invalidate other sections of the statute, 322 Mich. 350.

(5) those providing remedies and prescribing penalties for violation of certain specific sections, and no others., *viz.*, § § 22 and 22(a):

—and—

(6) those directly involved in this litigation, which encouraged and so far as might be possible prolonged both by directives and mandates the continued mediation and efforts to settle labor disputes, *viz.*, § § 9, 9a, 9b, 9c, 9d, 9e, 9f, 9g, and 22.

1. The first section of the Michigan labor mediation law, which declared public policy, remained unchanged, as did § 19 which provided that the act should "be deemed an exercise of the police power of the State of Michigan for the protection of the public welfare, safety, prosperity, health and peace of the people" and that all the provisions thereof should be liberally construed "for the accomplishment of said purposes".

2. The purely-administrative provisions of the act, §§ 3-7, incl., 12 and 13a, may be laid aside as inapplicable to the present controversy.

3. Those sections which define the respective rights of employers and employees, § § 8, 13a, 14, 15, 16 and 17, are important only as they indicate Michigan's general policy toward the affected parties to labor controversies, and the impartial hand with which the legislature of the State has protected such rights.

It is pertinent to note, however, that § 8 of the act provided it should be lawful "for employees, to organize together or to form, join, or assist in labor organization, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid

and protection, or to negotiate or bargain collectively with their employers through representatives of their own free choice".

The second paragraph of § 13a reads as follows:

> "Nothing in this act shall be construed to require an employee to continue rendering labor or service without his consent or to make illegal the quitting of his employment. No court shall have power to issue any process to compel any such employee to continue to render such labor or remain at his place of employment without his consent.[13]

Of those remaining in this group, § 14 deals with closed-shop agreements; § 15 makes it unlawful to take possession of property, against the will of the owner thereof, etc., and thus penalizes "sit-down strikes", so called; § 16 makes it unlawful for an employer

> "to initiate, create, dominate, contribute to, or interfere with the formation or administration of any labor organization; to discriminate in regard to hire, terms or other conditions of employmeir tin order to discourage membership in any labor organization; or encourage membership in, or initiate, create, dominate or contribute to a company union; or to discriminate against an employee because he has given testimony before the board or [arbitration] commission. Violation of this section shall be a misdemeanor and punishable as such";

and § 17 makes it unlawful "for any employee or other

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[13] This paragraph of § 13a lifts from the strike-election provisions of § § 9, 9a and 9b any charge that they impose involuntary servitude.

person by force, coercion, intimidation or threats to force, or attempt to force any person to become or remain a member of a labor organization, or for any employee or person by force . . . to force any person to refrain from engaging in employment", violation thereof being punishable as a misdemeanor.

4. The arbitration provisions of §§ 13 and 13a of the act are not presently involved and need not be considered.

5. We have already set forth the pertinent provisions of the penalty clause of § 22. And § 22a read as follows:

> "Sec. 22a. The board, or any person, labor organization, firm or corporation may pursue any proper legal or equitable remedy or relief in any court of competent jurisdiction for any act or conduct in violation of any of the provisions of this act".[14]

6. Those sections directly involved in this litigation, *viz.*, 9, 9a, 9b, and the applicable penal clause of 22, had the common purpose of continuing and encouraging the mediation process during a prescribed period of 10 to 20 days.[15]

§ 9, as amended by Bonine-Tripp, mapped steps which should be taken before a strike or lockout: (1) a 10-day notice of a labor dispute and impending strike in ordinary circumstances, a 30-day notice in the event of such a dispute in an industry affected with a public interest, *e. g.*, a

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[14]

It should be noted that since the effective date of the 1949 amendatory statute, § 22a has ceased to operate upon or affect the appellants.

[15]

It is our position that all other related sections of the group, 9a to 9g, incl., if applicable, should be construed in the light of their immediate context.

public utility or hospital; and (2) upon receipt of such notice, active and good-faith participation in mediation "prior to the calling of an election as provided" in § 9a.

§ 9a, also added by Bonine-Tripp, provided that in the event the parties to such dispute were not able to agree among themselves, or that a solution and determination of their controversy could not be reached by mediation, then before a strike might be called an election should be held in accordance with the terms of the statute, and a strike should not be instituted unless "a majority of all employees in such bargaining unit . . . vote in favor of such action".[16]

§ 9b, so added, imposed upon both employees and employer the duty "to avoid a cessation of employment or a change in the normal operation of the business during the entire period in which the respective steps required by section 9 . . . are being taken or until a strike is authorized by an election held as provided in section 9a".[17]

Certain related sections of the group, some of which are stressed by counsel for appellants, *esp.*, § 9e, are summarized as follows:

§ 9c, likewise added to the act in 1947, provided in substance that whenever a jurisdictional dispute arose in regard to representation of employees in any bargaining unit, it should be the duty of each party to such dispute or its representative "to at once file with the board a statement

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[16]

No punishment was provided, however, for a person or organization who called a strike in face of a vote the majority of which failed to authorize such a step.

[17]

Since in this case no election was held, the final clause of this section is inapplicable.

of the claim of such party and at the same time serve a copy upon each interested party". Upon receipt thereof, it became the duty of the board, "if possible, to settle such dispute by mediation" and if that failed to call "an election of the employees in the unit involved, as such unit is herein provided, to determine such issue as provided in section 9a of this act. No strike shall take place or be put into effect pending the determination of such issue as herein provided".[18]

§ 9d, so added, provided for voluntary arbitration of such disputes, before a board created as provided in § 13 of the statute.[19]

§ 9e, added by Bonine-Tripp, contains provisions upon which great emphasis is placed by appellants' counsel. It read as follows:

> "Sec. 9e. The board, after consultation with the parties, shall determine such a bargaining unit as will best secure to the employees their right of collective bargaining. The unit shall be either the employees of 1 employer employed in 1 plant or business enterprise within this state, not holding executive or supervisory positions, or a craft unit, or a plant unit, or a subdivision of any of the foregoing units: Provided, however, That if the group of employees involved in the dispute has been recognized by the employer or identified by cer-

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[18]

§ 22 provides punishment for one who calls or instigates a strike while mediation is pending as provided by § 9c, but not for any other failure to perform a duty prescribed therein.

[19]

This section would be unconstitutional under decision of the Michigan Supreme Court in Local 170, TWUA, CIO v. Genesee Circuit Judge, 322 Mich. 332.

tification, contract or past practice, as a unit for collective bargaining, the board shall adopt such unit".[20]

§ 9f, which made unlawful, mass picketing, threats, intimidation or coercion, is not involved in this litigation.

§ 9g, added in 1947 by Bonine-Tripp, provided that "whenever a vote is held . . . on the question of calling a strike, the board, if so requested by the employer or by the collective bargaining unit to be affected by the strike, shall cause to be either printed on the ballot or affixed thereto a copy or statement of the most recent offer submitted by the employer to the bargaining unit representing the employees in the course of collective bargaining negotiations between said employer and said unit".

4

Schedule of sections of Labor Management Relations Act, omitted from appellants' Appendix "B".

The following sections of the Labor Management Relations Act, 1947, omitted from appellants' Appendix "B", touch on the subject of State jurisdiction: § § 10 (a), 14 (a), 202 (c), 203 (b) and 303 (b). They are published as Appendix "C" at the back of this brief.

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[30]

It is our position that § 9e is not involved in this litigation; there was no jurisdictional dispute in the Chrysler matter, and appellants have always been recognized as the collective-bargaining representatives of the Chrysler Corporation.

Counter-Statement of Facts and Proceedings in the courts below.

We respectfully note the following inaccuracies and insufficiencies in appellants' statement of the proceedings and facts in the courts below:

1. The pleadings and issues drawn thereby.

(1) It is deemed important to note that appellants' amended and supplemental bill of complaint (39), filed in the trial court, drew in question the constitutional validity of § § 9, 9a, 9b, and 22 of the Michigan statute here involved, and did not challenge the validity of any other section of the act (39-46).[21]

(2) The right asserted by appellants in paragraph 7 of their bill of complaint (41) was "to urge strike action, instigate strikes, call strikes, and to request the aid of others in such strike projects, free from the coercive efforts of Secs. 9, 9a and 22 of Act 318 Public Acts of 1947, insofar as the said sections make unlawful and penalize the exercise of said rights *unless such strike is approved by a majority vote in the election* provided for in said statute, and this assertion of right and the need therefor applies to the existing dispute between the UAW members employees of the Chrysler Corporation, and also to prospective disputes between UAW members and employers in the State of Mich-

[21] It is especially noteworthy that the appellants in their bill of complaint, directed no attack upon § 9e of the act.

igan concerning the legitimate subjects of agreement between said employees and employers".[22] [Emphasis supplied].

(3) In paragraph 13 (43) of appellants' bill the issue of constitutional validity is confined to § 9 and § 9a, the strike-election provisions, and § 22, the penalty clause, the attack being directed to those sections only insofar as they subject "to criminal penalties persons who instigate a strike or who call or cause a strike to be placed in effect while an election is pending under said Section 9, and insofar as such election has application to a strike by reason of a dispute concerning wages or terms of employment in businesses not affected with a public interest not a public utility nor hospital". And it is alleged on four distinct grounds (43-44) that § 9a is unconstitutional.

Grounds (a), (b) and (c) invoke protection under the due process clause of the Fourteenth Amendment and the State Const. 1908, Art. 2, § 16, upon the major premise that the appellants are deprived by the statute of the right to strike "unless and until a majority in the collective bargaining unit, including those not associated with the plaintiffs, approve said strike", but as we have so often observed, the statute imposes no penalty in such circumstances (footnotes 11, 14, 16, 17, 18, 22).

On the final ground, (d), the premise of the argument is the same, *viz.*, that under Michigan law a strike is penalized unless approved by a majority vote in the collective bar-

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[22]

The italicized phrase in this paragraph indicates the error in the pleader's conclusion of law. The 1947 statute did not penalize the exercise of such rights "unless such strike is approved by a majority vote in such election"; and the only action so penalized was the call, or instigation of a strike pending such election. This cannot be too strongly emphasized in stating our position.

gaining unit, from which the conclusion is drawn that such a law impairs the rights of representation and of collective bargaining possessed by the UAW and its constituent locals pursuant to the National Labor Management Act, 1947, "in that it assumes to transfer these powers and rights to a majority in a collective bargaining unit in the state of Michigan, and empowers said majority to continue indefinitely a collective bargaining contract to maintain a condition of no such contract, or to approve terms of contract offered by an employer, contrary to the commerce clause of the United States Constitution," Art. I, § 8 (3). Once again, the pleader of such legal conclusions is uninformed.[23]

(4) Counsel for appellants, brief, p. 5, states that among other things the plaintiffs' bill alleged (43) "that defendants threatened to prosecute all persons instigating or causing a strike *prior to authorization by an election*". The record (43) does not quite bear out this broad assertion, for the appellants there allege (paragraph 12, p. 43):

> "The defendant . . . prosecuting attorney . . . threatens to prosecute all persons who in said county instigate a strike or who shall call or cause a strike to be placed in effect *while an election is pending* under Section 9 of Act No. 318 Michigan Public Acts 1947. [Emphasis added by us].
>
> The defendant . . . Attorney General of the State of Michigan, threatens to prosecute all persons who in said State of Michigan instigate a strike . . . *while an election is pending* under said Section 9 of Act No. 318 . . . ". [Emphasis is ours].

---

[23] It is also to be noted, we think, that the constitutional validity of § 9c is not drawn in question.

(5) And finally it may be noted that the relief sought (45) by the plaintiffs [appellants] in their bill of complaint, was an injunction to restrain the prosecuting officials of the State [the defendants-appellees] from enforcing "by any criminal prosecution" the provisions of the sections involved.

2. Opinion and decree of trial court:

The opinion (66) of the trial judge seems to be based in part at least upon the erroneous assumption that the Bourne-Tripp Act of 1947 "declared unlawful [and penalized] strikes instituted without first securing approval by a majority of the employees in the State in the collective bargaining unit of the plant involved".[24]

And the decree (70-71) seems to be based upon the same faulty premise.

3. Opinion and judgment of Michigan Supreme Court:

It should be noted that the opinion of the Michigan Supreme Court (121-134), 325 Mich. 250, includes *dicta* to the effect that "it is not an unreasonable exercise of the State's police power to forbid resort to a strike *which is not approved by a majority of the employees involved*, and thereby protecting both the majority of the employees in the bargaining unit and the public". But the Court, in their opinion, do not undertake the distinct task of construing the language of the sections involved, nor do they pass upon

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[24]

That erroneous assumption was indulged prior to the 1949 amendment of the act in question, and upon review it was carried into the Supreme Court.

the limited range of the penal clause of § 22 as presently applicable to the appellants. Such *dicta* was not essential to decision, for several reasons to be discussed in our argument.[25]

The decision, as distinguished from the *dicta* of the Court, was that the prosecuting officers of the State could not be enjoined from instituting criminal proceedings against the appellants for violating the penal clause of § 22 of the Bonine-Tripp Act, which provided punishment only for those who should "call or cause a strike to be placed in effect, . . . while an election is *pending*", not *after* such an election had been held.

4. Concerning statements in brief for NLRB as amicus curiae

We respectfully suggest the following inaccuracies and insufficiencies in the "Statement" of counsel for the NLRB, and in their brief as *amicus curiae*:[26]

1. **Question Presented**: It is said that the Board's interest in this case is limited to the single question "whether the provisions of the National Labor Relations Act, preclude Michigan from prohibiting the calling of strikes incident to lawful collective bargaining demands unless a prescribed procedure for mediation is followed and unless

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[25]

Among them, that since the appellants called the strike while an election was pending, and since such an election was never held, they could not in any event be prosecuted for calling a strike after an election had failed to give them a majority.

[26]

We did not receive a copy of the brief for NLRB until March 14th, and then only in typewritten form.

a majority of the employees in a state defined bargaining unit authorize such strike in a State conducted secret ballot election".

We prefer to state the question as we do below under the head "Questions Presented", noting at this point that no prescribed "procedure for mediation" was drawn in question by the appellants in the courts below, for there the only challenge was the penalty clause as applied to the strike-election proceedings. Nor should this Court consider the validity of the "majority provisions" of the act, for violation of which no penalty was prescribed.

2. Union-Management Contract: There are several errors in the following allegations found in the first paragraph of counsel's "Statement", p. 3 of typewritten brief:

> "The contract involved in the case at bar was entered into on April 26, 1947, and was terminable at the option of either party on April 26, 1948 (R. 14, 80, 115-116)".

The contract, under its terms (115-116) was to continue "in full force and effect until April 26, 1949, and from year to year *thereafter* unless between April 1 and April 15 of any year *thereafter* (emphasis ours), the Corporation notifies the Union, or the Union notifies the Corporation, of its desire to terminate the agreement, and thereupon the agreement shall terminate as of April 26 of the year in which the notice is given". Counsel are therefore mistaken when they say that the contract was terminable April 26, 1948.[27]

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[27] The courts below were not asked to interpret the terms of the Union-Corporation contract. As we construe them, the agreement could not be terminated until April 1949, a year after the dispute arose.

Counsel continue:

> "In February, 1948, a dispute arose between the Union and the Company concerning amendment of the wage provision of the contract, and during that month the Union pursuant to Section 8 (d) of the National Act gave notice to the Company of its intention to *terminate* (emphasis supplied) the contract unless agreement was reached concerning the wage issue in dispute (R. 8-9)".

Assuming, as we must, that the Union at all times complied with the terms of its agreement (Ex. 4, 80) with the Corporation, it is incorrect to say that during February 1948 "the Union pursuant to Section 8 (d) of the National Act gave notice to the Company of its intention to terminate the contract unless agreement was reached concerning the wage issue in dispute".

For it is important to note that the 1948 negotiations were proceeding in accordance with the following express terms of such contract (115-116):

> "(116) During the term of this agreement the rates for all existing classifications are fixed except that each party may on one occasion only, and upon written notice to the other, signify its desire to open wage rate negotiations, in which event the notice shall set forth the adjustment or adjustments desired".[28]

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[28] It will be our position in argument, that the language of § 8 (d) of the Labor Management Relations Act, 1947, does not apply to such interim bargaining. See report of Committee on S. 1126.

Moreover, the secretary-treasurer of the Union, testified (8):

"There was a dispute between the members of the U.A.W. and the Chrysler Corporation, concerning the establishment of a proper scale of wages. The dispute arose about the middle of February, under the terms of our contract to give the corporation notification of our intention to amend the wage agreement we had, and we notified the corporation about the middle of February of our intention to amend our wage provisions of the agreement". [29]

[29]

The notice to which this witness referred (8), cannot be found in the record as an exhibit. At least we cannot find it.

IV

Questions Presented

We cannot accept all the premises of the "Questions Presented" by counsel for appellants, brief, p. 4, the first of which is set forth as follows:

> 1. Whether the provisions of the Michigan statute prohibiting the calling of a strike for higher wages in an industry affecting commerce unless and until a majority of all employees in the collective bargaining unit as designated by the State Mediation Board have so voted in a state-conducted election invades the field which Congress has occupied by the Labor-Management Relations Act, 1947?

Our suggestion is that the question might be rephrased thus:

> 1. Whether the provision of § 22 of the Michigan statute which in 1948 penalized the calling of a strike while a state-conducted election directed to be held as provided in § 9a of the act, was pending, as applied to an industry affecting commerce, during wage-rate-classification negotiations opened upon notice from the Union recognized by the employer as representative of the employees, of its desire so to negotiate according to the terms of a subsisting agreement (Ex. 4, R. p. 116), invades the field which Congress has occupied by the Labor Management Relations Act, 1947?

V

Preliminary Considerations

1. Interest of State in this litigation:—Michigan's purpose is not to seek judicial curtailment of the lawful rights of organized labor, guaranteed by the Federal Constitution and the Taft-Hartley Act, or to champion the cause of Management as opposed to Labor, or to advocate any legislative policy; nor is she interested primarily in obtaining judicial leave to exact penalties prescribed in § 22 of the statute for commission of a misdemeanor.[30]

Counsel for the State are here to maintain Michigan's right through her legislature within constitutional limitations set by the commerce clause, and without any desire to "occupy that field" [if metaphor must be employed], to exercise those inherent police powers which are so essential for the protection of the peace, health, safety and welfare of Michigan's inhabitants,—a sovereign right now seriously challenged by a Federal Authority acting under and by virtue of an Act of the Congress the valid purpose of which is to protect "the flow of commerce".[31]

2. Presumptions to be entertained: We express the hope that the Court, in approaching the ever-difficult task of

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[30]

Such penalty clause, one should always remember, is the center of this controversy.

[31]

Counsel for NLRB conscientiously wish to extend that Board's jurisdiction to the farthest reaches of the Taft-Hartley Law, and feel obligated to assert it over all matters technically within reach. Please see The Law Society Journal, Feb. 1949, p. 145, esp. note (38), article, Local Business-No Man's Land in Labor Relations, by Edward L. Schwartz.

adjustment between conflicting Federal and State interests, will be hospitable to those strong presumptions which favor the constitutional validity of State Laws, keeping in mind the constitutional purpose of each statute presently involved, both State and Federal: that "the State may punish * * * for the safety and welfare of its inhabitants; the Nation may punish for the safety and welfare of interstate commerce".[32]

VI

Summary of the Argument

First:

Narrow range of judicial inquiry:

This appeal involves no more than the constitutional questions which arose from the threat of prosecuting officers to exact the penalties prescribed in the 1947 version of the Michigan statute, § 22, for one who in 1948 called or instigated a strike while a state-conducted election, directed to be held as provided in § 9a thereof, was pending.

1. The only threat made by state officials was to prosecute all persons who "instigate a strike or who shall call or cause a strike to be placed in effect while an election is pending under said Section 9 of Act No. 318 Michigan Public Acts 1947" (43).

2. The appellants did not violate the "majority rule" promulgated in § 9a of the act; and § 22 of the statute

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[32] California v. Zook, 336 U.S. 725, 738.

prescribed no penalty for calling a strike *after* an election had been held, even though a majority voted against such a step.

3. The "majority rule" phase of the question presented by appellants, is therefore moot; and this Court should be reluctant to entertain it. [33]

4. This Court is also reluctant to decide moot questions or to give advisory opinions which cannot affect the rights of litigants in the case before it;[34] or to pass upon the complaint of one who fails to show that he is injured by the operation of a State statute which he attacks on constitutional grounds, or until it is necessary to decide such questions in order to preserve the rights of the parties;[35] or to decide abstract, hypothetical or contingent questions; or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied; or to decide any constitutional question except with reference to the particular facts to which it is to be applied.[36] The "majority rule question", presented by appellants, if considered, would do all of this.

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[33] Heithmuller v. Stokes, 256 U.S. 359.

[34] St. Pierre v. United States, 319 U.S. 41, 42.

[35] Coffman v. Breeze Corporation, 323 U.S. 316, 325.

[36] Federation of Labor v. McAdory, 325 U.S. 450, 461.

Second:

Claimed invasion of federal field of regulation:

It might be helpful, when considering the problem, to recall those principles and rules which this Court has evolved over the years for guidance in construing statutes enacted by the Congress in exertion of its power to regulate commerce among the States.

It should never be held that Congress intends to supersede or suspend the exercise of reserved powers of the States, even where that may be done, "unless and except so far as its purpose to do so is clearly manifested".[37] No constitutional rule compels Congress to occupy the whole field, for when regulating commerce, or any business whose operation affects commerce, it may occupy only a limited section thereof; and when this is done, state regulation outside that limited field, and otherwise admissible, is not forbidden or displaced.[38] Indeed, it might be said, that without such judicial restraint, the commerce clause, through lax construction of congressional enactments, might long ago have strangled State sovereignty to death.

This Michigan police measure enacted to protect the public peace, health, safety and welfare, occupied a section

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[37]

Allen-Bradley Local v. Board, 315 U.S. 740, 745; — Illinois Central R.R. Co. v. SPUC of Illinois, 245 U.S. 493, 510.

[38]

Kelly v. Washington, 302 U.S. 1, 9, 10, holding that exercise by the State of its police power is superseded only where the repugnance or conflict is so direct and positive that the two acts cannot "be reconciled or consistently stand together".

of the field of labor-management regulation into which Taft-Hartley did not enter. Congress evinced no intent to occupy the *entire* field of such regulation by passing the LMRA, 1947;[39] much less did it evince such a purpose by rejecting a strike-vote requirement resembling that contained in the Michigan statute.

A. *Specif.*, the Michigan statute did not invade the field of regulation occupied by the Congress in any section of LMRA enumerated in appellant's brief, p. 10, *viz.*, §§ 8 (b), (4), 8 (d) or 303. Nor do the national emergency provisions of §§ 209-210 supply the analogy suggested by counsel.[40]

B. We find it impossible, moreover, to accept appellants' dog-in-manger philosophy which would exclude state regulation of the same subject because Congress finally rejected strike-election provisions of the House Bill.[41]

C. While this Court's opinion in *International Union, UAW, v. Wisconsin Board*, 336 U.S. 245, did not fully determine the precise question here presented, the court

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[39]

To say that one has entered a field does not, as appellants seem to think, mean that he occupies the whole farm.

[40]

Like the national emergency sections of Taft-Hartley, the Michigan statute imposes no penalties for calling a strike after such a vote it taken, but constitutes public opinion as the court of last resort.

[41]

We shall have occasion to refer to legislative history, as do counsel in this connection. Please see Argument.

below was justified in considering it applicable to the case at bar.[42]

D. Furthermore, Taft-Hartley contains several sections evincing congressional intent to leave to the states a reasonable residue of sovereign power to preserve the peace, health, safety and welfare of their citizens, and to save them from the dire consequences of economic collapses attendant upon management-labor controversy.[43]

E. And finally, it does seem reasonable to suppose that two such authorities, the one created by the Congress, the other by a state legislature, can work in harmony together without invading forbidden territory.

Third:

Claim that Michigan statute clashes with LMRA at its very roots:

Counsel contend, brief, summary of argument, p. 12, that the Michigan statute clashes with the National Act at its very roots, and they intimate, brief, pp. 27-38, that the Michigan statute interferes with appellants' Taft-Hartley-given right to conduct collective bargaining as authorized representatives of Chrysler employees, Union members within the bargaining unit of industrial plants located in Michigan, Indiana and California.

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[42]

The court below merely said, 325 Mich. 256, that this recent decision of this Court "is informative in the field of law pertinent to the instant case", not that it controlled the question.

[43]

Please see Appendix C, and § 13 of the Taft-Hartley Act.

There are, we think, several rather short answers to this and other contentions of like nature found in subdivisions A, B and C, summary of argument, brief, pp. 12-13.

1. The "roots" of LMRA, aside from those provisions to which sound objections have been made by friends of organized labor,[44] are entwined about guarantees of the right to bargain collectively through chosen representatives; indeed the entire act, aside from its many objectionable features, might be designated as a "collective-bargaining statute", and any interference with that right by State legislation, would be out of bounds.

The Michigan statute, on the other hand, recognizes the right to bargain collectively (§ 8) and does not presume to regulate Labor's choice of bargaining representatives.[45]

The Bethlehem[46] and La Crosse[47] cases may be distinguished on the ground that each involved administrative determination or certification of collective bargaining representatives. Such a situation is not present in this cause.

B. Counsel point out, brief, p. 12, that under § 8(d) of the LMRA "a party to a collective bargaining agreement desiring to terminate or modify that agreement must notify

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[44]

This is the first time to our knowledge that counsel representing Labor have interpreted LMRA as a charter of liberty.

[45]

Section 9e of the Michigan statute merely designates the unit within which arbitration may be held, § 9d, or an election may be conducted. It has nothing to do with bargaining representation.

[46]

Bethlehem Steel Co. v. N.Y. State Labor Relations Board, 330 U.S. 767.

[47]

La Crosse Tel. Corp. v. Wisconsin Board, 336 U.S. 18.

the other party 60 days in advance, must notify the federal and state conciliation agencies 30 days in advance and must continue in effect without strike or lockout the terms of the existing agreement".

But the Michigan statute, as here applied, did not clash with the foregoing provisions of Taft-Hartley, for in this particular case the bargaining was conducted under the terms of an existing contract and the Union did not seek to terminate it. In such circumstances, we respectfully submit, § 8(d) of the LMRA does not apply.

C. Contrary to appellants' fears, brief, p. 13, the Michigan statute does not interfere with their right to strike as guaranteed by Taft-Hartley.

Fourth:

Claimed violation of due process

We cannot, of course, agree with counsel's conclusion, brief, p. 13, that the Michigan statute violates the due process clause of the Fourteenth Amendment. And we respectfully submit, as we shall urge in argument, that the Bonine-Tripp Act constituted a valid and reasonable exercise of the police power.

VII

The Argument

Point One

Settled practice of this court narrows the issues in the pending review.

When this court passes upon the constitutional life-span of a state statute enacted in exertion of the police power, the range of judicial inquiry is short and in times past has been confined to realities.

As Mr. Chief Justice Stone put it:

> "In any case, the Court will not pass upon the constitutionality of legislation in a suit which is not adversary, . . . or upon the complaint of one who fails to show that he is injured by its operation, or until it is necessary to do so to preserve the rights of the parties".
>
> *Coffman v. Breeze Corporations*, 323 U.S. 316, 324.

> "This Court is without power to give advisory opinions. . . . It has long been its considered practice not to decide abstract, hypothetical or contingent questions, . . . or to decide any constitutional question in advance of the necessity for its decision, . . . or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied, . . . or to decide any constitutional question except with reference to the particular facts to which it is to be applied".
>
> *Federation of Labor v. McAdory*, 325 U.S. 450, 461.

Please see, also, authorities cited in notes 33 and 34, *ante*, as well as the following:

> *Kimball v. Kimball*, 174 U.S. 158, 161, holding the Court is not empowered to decide moot cases or abstract propositions, or to declare for the government of future cases, principles or rules which cannot affect the result as to the thing in issue in the case before it;
>
> *Chicago Bd. of Trade v. Olsen*, 262 U.S. 1, 43, holding a plaintiff cannot invoke this Court's decision as to validity of an act of Congress until in danger of suffering prejudice;
>
> *Near v. Minnesota*, 283 U.S. 697, 708, holding that in passing upon the constitutional validity of a statute, the law must be tested by its operation and effect.

And in *Heitmuller v. Stokes*, 256 U.S. 359, the Court had occasion to say:

> "The duty of this Court . . . is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it".

It is not our position that the case at bar has become moot, or that the questions involved are wholly abstract—far from it. What we are trying to say is that insofar as we are concerned with the "majority rule" set up by § 9a of the Michigan statute, the appellants have failed clearly and plainly to show that they will suffer prejudice or injury or harm as the result of the decision of the court below

except as such decision subjects them to the penalty prescribed by § 22 of the act for any person who calls or instigates a strike "while an election is pending".

Point Two

The Michigan statute did not invade a field which Congress has occupied through the Labor Management Relations Act, 1947.[48]

Counsel for appellants urge that the Congress when enacting LMRA evinced its intention to occupy the field of governmental regulation of strikes in industries affecting commerce, (1) by enacting specific provisions dealing with strikes in such industries, and (2) by expressly rejecting the strike-vote provision of the Hartley Bill which Michigan has enacted.[49]

As pointed out in our summary of the argument, there are certain presumptions and rules of construction to be observed in solving this important question, and before striking down a statute because in conflict with an act of the Congress, this Court requires strong manifestation of congressional intent to supersede or suspend the exercise of state reserved powers.

> "In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exer-

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[48]

Appellants' brief, pp. 14-27.

[49]

H.R. 3020, as passed by House, § 101, Sec. 2 (B), p. 7; Legislative History LMRA 1947, pp. 164-166.

cise of the reserved powers of a State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested".

Ill: Cent. R.R. v. Public Utilities Commission, 245 U.S. 493, 510.

"And when Congress does exercise its paramount authority, it is obvious that Congress may determine how far its regulation shall go. There is no constitutional rule which compels Congress to occupy the whole field. Congress may circumscribe its regulation and occupy only a limited field. When it does so, state regulation outside that limited field and otherwise admissible, is not forbidden or displaced. The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together'".

Kelly v. Washington, 302 U.S. 1, 10.

Our position is that the act of Congress, when placed side by side with the Michigan statute for comparison, should be liberally construed to serve its *primary* purpose to protect the "flow of commerce"; the Michigan statute should if possible be liberally construed to preserve a reasonable exertion of the State's power to protect her public welfare as the *primary* purpose of such a legislative measure; and each should be so interpreted as to preserve harmony and accord between federal and state authorities. On the other hand, each enactment, state or federal, should be strictly and narrowly interpreted with respect to any *secondary* object it is designed to carry out.

So tested, if the statute of the State has as its ulterior purpose the regulation of interstate commerce, or the obstruction of the flow of such commerce "by any indirection", it deserves destruction at the hands of this Court.

By the same standards of judicial appraisal, if LMRA, under the guise of commerce protection, has as its secondary object an entry into the field of state police regulation, it should be stopped at the boundary line; otherwise it might be deemed unconstitutional; and this Court will if possible so construe a statute as to accord it constitutional validity.[50]

A

Congressional enactment of specific provisions dealing with strikes in such industries, evinces no intent to bar the States from exercise of police power.[51]

1. It is said, brief, p. 17, that Congress carefully listed certain types of strikes and made them unfair labor practices, and counsel cite several examples of outlawed strike objectives, § 8 (b) (4) LMRA.

The Michigan statute, while forbidding and penalizing certain definite acts of intimidation and coercion,[52] unlike Taft-Hartley, proscribes no strike objectives, and basically that law has as its main purpose the mediation of labor

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[50]

American Power & Light Co. v. SEC, 329 U.S. 90;
Ex Parte Mitsuye Endo, 323 U.S. 283.

[51]

Appellant's brief, pp. 14-27.

[52]

See Michigan Statute, § § 9f, 15, 16, 17, 22.

disputes, the continuance of that process for as long a period of time as possible, and the protection of the public from the disorders which attend labor disputes and strikes. Strikes are not forbidden as such, and, as we shall presently observe, the object of the strike-election-majority rule is to discourage strife which arises from minority strikes.[53]

2. Counsel place strong emphasis upon the provisions of § 8 (d) of the Taft-Hartley Act under the terms of which no strike to terminate or modify a collective bargaining agreement is permissible in the absence of a 60-day notice to the other party, 30-day notices to federal and state mediation agencies,[54] and bona fide negotiations in the intervening period. And counsel note, brief, p. 18, "in addition to making the failure to follow these procedural steps unfair labor practices, ... striking employees in such circumstances lose status as employees and the right to reinstatement". [55]

That section, however, did not apply to the existing situation which confronted management and labor when collective-bargaining negotiations were conducted between appellants and the Chrysler corporation in February through May 1948.

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[53]

To be realistic, it should be noted that under Labor's present statesmanlike leadership, strikes are not called unless backed by the majority of employees.

[54]

It is important to observe that state conciliation services are here recognized.

[55]

Such a law is much harsher than the Michigan statute here challenged as depriving labor of its rights without due process of law.

Section 8 (d) provides that where a collective bargaining contract is in effect, a notice to terminate or modify it must be given 60 days "prior to the expiration date thereof" [our emphasis], or in the event such contract contains no expiration date, 60 days prior to the time "it is proposed to make such termination or modification"; furthermore, there must be no strike "for a period of 60 days after such notice is given".

Thus, where a contract has an expiration date, only one type of notice is required by the Federal Act, *viz.* a notice to be given 60 days before such expiration date.

The Chrysler-UAW contract (80-116) had an expiration date; it was executed April 26, 1947, and under its express provisions was to continue in effect at least until April 26, 1949; the strike occurred May 12, 1948.

As heretofore noted, that contract provided (115-116) for notice by either party of desire to amend its terms; it also provided (116) that during the term of such agreement either party might on one occasion only, and upon written notice, signify its desire "to open wage negotiations", and the negotiations which were proceeding when this controversy arose, in 1948, were pursuant to the foregoing conditions of a subsisting contract and strictly in accordance with its provisions. The bargaining was, therefore, what is commonly called "interim bargaining". And § 8 (d) did not apply.

That Congress had in mind making the 60-day notice applicable only when new contracts were being negotiated appears from the "Report of the Committee of Labor and Public Welfare on S. 1126", where it was said in part, p. 24, Legislative History LMRA, p. 430:

"Most agreements have an expiration date, with an automatic renewal clause in the absence of advance notice by either side of a desire to terminate or modify. Under this section, parties to collective agreements in the future would be required to give 60 days' notice in advance of the terminal date, if they desire to terminate or amend".

The argument of counsel on this point, therefore, falls with its premises.

Even though by some stretch of the imagination it might be said that § 8 (d) applied, Congress did not provide therein that *all* strikes after 60 days would be legal, or that there is an automatic right ~~to strike after expiration of the prescribed period right~~ after expiration of the prescribed period, to call or instigate a strike forbidden by a state law,[56] provided, of course, such a law is otherwise valid.

3. The fact that Congress provided for strike ballots only in national emergencies clearly indicates that it did not intend to interfere with the right of the States to provide in appropriate cases for strike ballots in labor disputes not determined to constitute national emergencies. Indeed it might well be said that each legislative authority, federal and state, has kept well within its own peculiar field, national and local.

Counsel's argument loses sight of the "well-established principle that Congress may circumscribe its regulation and occupy a limited field, and that the intent to supersede the exercise by the State of its police power as to matters not

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[56]

NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240;

Southern Steamship Corp. v. NLRB, 316 U.S. 31;

Gibonev v. Empire Storage Co., 336 U.S. 490.

covered by the federal legislation is not to be implied unless the latter fairly interpreted is in actual conflict with state law".

Townsend v. Yeomans, 301 U.S. 441, 454;

Kelly v. Washington, supra, 302 U.S. 1, 10.

In other words, it does seem more logical, at least to us, to conclude that Congress having seen fit to legislate on only one phase of the matter did not intend to occupy the whole field.

B

Rejection by Congress of strike-vote provisions similar to those enacted by Michigan, evinced no intent to bar state legislation on the subject.

In the history of legislation which found final expression in LMRA, H.R. 3020, as reported to the House Committee on Education and Labor, in addition to stating that the NLRB must provide a strike election where a strike election is threatened imperiling public health and safety (§ 203), required that where no agreement was in effect providing for adjusting or settling of disputes, and the parties did not settle, a strike vote must be conducted by the Board "on the question whether such employees desire to reject the employer's last offer of settlement and to strike" (§ [B] of § 101).

The Bill as reported by the Senate Committee on Labor and Public Welfare (S. 1126) confined strike elections to national emergency disputes (§ 207 [b]).

The Joint Conference Committee Report refers to the foregoing strike election provision of H.R. 3020 without

comment, House Report 510, Report of the Joint Conference of the House and Senate on H.R. 3020, p. 34.

The final result was enacted into law was the Senate Bill which did not provide for such elections.

It is argued here in effect that Congress having thus considered and rejected strike-elections, it thereby, and through expression of opinion on the subject, declared the public policy of the United States to be that strike elections should *not* be held.

The answer is that "consideration" by Congress without affirmative action is not the rule of thumb announced by this Court in determining whether Congress has preempted the field, and, second, if such a rule were followed, Congress could by refusal to act, and without more, take from the States their inherent power over police regulation.

Had Congress so intended in the instant case to take such police power from the States, it could have made its purpose manifest with drastic clarity.

> *Algoma Plywood & Veneer Co. v. Wisconsin Board*, 336 U.S. 301, 306.

We respectfully submit that, one of the Houses of Congress having recommended Federal legislation requiring a strike vote, and the Senate having confined the strike vote to cases of national emergency, and both Houses having adopted the Senate Bill, confining such legislation to national emergencies, Congress intended to without such power from the NLRB and let it rest in the States, where it would normally reside in the absence of clear federal preemption.

C

The International Union Case Supports the decision below.

We feel that the Supreme Court of Michigan has in its opinion, 325 Mich. 256-259, so carefully analyzed the case of *International Union v. Wisconsin Board*, 336 U.S. 245, that little more need here be said. In that opinion, however, the court applied the decision in *International* to the question of due process and freedom of speech. And we think the court was absolutely correct in reaching the following conclusion:

> "Further, it is difficult, if not impossible, to read the decision in the *Wisconsin Case* hereintofore noted without coming to the conclusion that in the exercise of its police power a State may by regulation regulate the right of employees to strike, providing such regulations are not in conflict with or inconsistent with Federal regulations".

In the *International Case*, *supra*, this Court applied the clear-manifestation-rule enunciated in *Allen-Bradley Local v. Wisconsin Board*, 315 U.S. 740, 750, and in the case at bar, we respectfully submit, Congress has not clearly manifested its intent to exclude the States from the field here in question. The mere fact that in *International*, sporadic work stoppages were involved, was not in our opinion the determining factor, though counsel in their zeal make much of that situation.

Point Two

The Michigan statute, a State police measure designed to protect the general public as the forgotten party to such disputes, by discouraging minority strikes, does not conflict with LMRA, a collective bargaining law designed to protect the flow of commerce.

Point Three

Such a State police measure so designed, does no violence to the due process clause of the Fourteenth Amendment.

These two questions are, in our mind, inextricable, we choose to consider them together.

First: Appellants contend, brief, pp. 27-38, that the Michigan statute clashes with the National Act "at its very roots", thus defeating the basic purpose of Taft-Hartley, *viz.*, "the encouragement of collective bargaining"; under the Act, their argument runs, employees are accorded the right to organize and "bargain collectively through representatives of their own choosing"; the LMRA sets up procedures for determining the representatives of the employees' choosing "and requires that the employer deal with these representatives and no others so long as they remain the representatives in good standing".[57]

The gravamen of appellants' charge against the Michigan statute is that by requiring a strike vote on the employer's last offer,

> "the State of Michigan is in effect assuming the power to nullify the Congressionally-conferred authority of the chosen representatives of the employees to act on behalf of the employees and reject the employer's last

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[57] J. I. Case Co. v. National Labor Relations Board, 321 U.S. 332.

offer. The State of Michigan is thus interfering with collective bargaining through representatives chosen by the employees just as much as if it adopted additional qualifications for those representatives not prescribed by Congress". Brief, p. 28.

In short, it is urged, the Michigan statute challenges the authority of the representatives of the employees to act on their behalf; hence the local law clashes with the National Act.

And, finally, it is said that such clash comes at three vital points: (1) the bargaining unit under state law is different from the "bargaining unit" under the National Act; (2) the State Act requires delays in the collective bargaining process in conflict with the National Act; and (3) the State Act conflicts with the right to strike protected by the National Act.

We agree, of course, that the LMRA is basically a collective bargaining statute designed to protect that right as a means of relieving interstate commerce of the burdens placed upon such commerce by labor-management disputes.

The Michigan statute, on the other hand, is essentially a police regulation the purpose of which is to protect its citizens from the consequences of such disorders. It does not pretend to regulate or otherwise restrict collective bargaining; indeed it fully recognized that right, § 8. But it sets up no machinery in furtherance of such bargaining, and it defines no "unfair labor practice" within that field.

Second: Appellants contend that the Michigan statute imposes unconstitutional restraints upon the appellants' right to strike [acknowledged to be qualified] and upon their rights by speech and assembly to "instigate" or "call" or "cause" a concerted peaceful refusal to work to secure lawful demands; the right of workers to strike

peacefully and for lawful purposes is said to be "a fundamental one, like their rights to speak and to assemble; that state action placing restraints upon the exercise of those rights must, if it is to be valid, be narrowly drawn to meet important public interests entitled to such protection; therefore, counsel conclude, the Michigan statute fails to meet this test.

Both propositions, first and second, carried to their logical conclusion, and baldly stated, would amount to this:

1. The Taft-Hartley law was enacted primarily to protect the rights of one group of citizens; it set up no machinery to regulate *minority* strikes or to protect the general public from the consequences of such strikes; it provided for no election to determine whether a strike should be called, save where a National Emergency may arise; it provided a cooling-off period only in those cases where management or labor or both desire to negotiate a new contract to replace an existing agreement between them; and it protected the workers in their lawful right to bargain collectively by utilizing as a means of lawful coercion, a continuing threat of strike.[58] By rejecting a strike-vote-election plan, Congress expressed an intent to encourage minority strikes regardless of the consequences to the general public or the majority of employees in any particular unit, and to keep the States out of that field of regulation.

2. Even in the absence of such a clash of authority, federal and state, a State violates the due process clause whenever it undertakes to discourage, delay or regulate a minority strike, for under our constitutional system, the rights of such a minority must prevail even though the majority must suffer.

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[58]

Such a bargaining process is, of course, legitimate, and we do not question its validity. Thornhill v. Alabama, 310 U.S. 88, 103.

1

No clash of Authority here.

A. Bargaining Unit: The Michigan statute as it stood in 1948, did not expressly or impliedly regulate or attempt to regulate the bargaining process between employer and employee, but it left Labor free to choose its own representatives for that purpose, and it recognized the "rights of Labor" in all legitimate respects.

Thus, the law provided, § 8:

> "Sec. 8. It shall be lawful for employees to organize together or to form, join or assist in labor organization, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their employers through representatives of their own free choice".

And, § 13,

> "Nothing in this act shall be construed to require an employee to continue rendering labor or service without his consent or to make illegal the quitting of his employment. No court shall have power to issue any process to compel any such employee to continue to render such labor or to remain at his place of employment without his consent".

Section 16 made it

> "unlawful for an employer to initiate, create, dominate, contribute to, or interfere with the formation or administration of any labor organization: to discriminate

in regard to hire, terms or other conditions of employment in order to discourage membership in any labor organization; or to encourage membership in, or initiate, create, dominate, or contribute to a company union; or to discriminate against an employee because he has given testimony before the board or commission. Violation of this section shall be a misdemeanor and punishable as such".

The statute, as it stood in 1948, at the time of conflict, made no provision for the choice of representatives of Unions in collective bargaining.

Section 9e, of course, provided for "bargaining units", but its purpose was undoubtedly to determine the units or plants in which the election provided in § 9a should be held, and to determine the units in which arbitration should occur under § 9d.

Moreover, the appellants have always been recognized by Chrysler and by the Michigan mediation authority as well, as the bargaining representatives of the Chrysler employees, under the proviso of § 9e.

That fact removes from the controversy any conflict in the choice of bargaining representatives, and it makes the *Bethlehem* and *La Crosse* cases inapplicable; there are present here no "very real potentials of conflict", 336 U.S. at 26.

Much is made of the fact that Chrysler owns and operates industrial plants in Michigan, Indiana and California; that commerce flows between them; and that NLRB by virtue of an order in an adversary proceeding certified this Union as the bargaining representative of employees in all plants within this Tri-State area.

Does this mean [to pose a rhetorical question] that Michigan's citizens thus lose protection from the consequences of minority strikes? Or that the State of Michigan, by virtue of necessity for uniformity, loses the power to protect her inhabitants from economic disaster, unemployment, clashes between contending factions in strife-ridden automobile plants, and all the concomitant evils which follow a minority strike?

B. Right to strike: Michigan's statute does not interterfere with the "right to strike" guaranteed by the National Act.

In the first place, § § 9, 9a and 22 of the Bonine-Tripp Act, as it stood in 1948, before amendment, penalized the calling of a strike "pending an election"; it did not penalize those who called or instigated a strike after such an election had been held.

The net result was that the calling of a strike in Michigan might be delayed for a matter of 10 or 20 days while a strike-vote was being taken. After such a strike vote had been taken, a strike could be called with impunity even though a minority voted for it. The only consequence which such a Union could suffer would be the wrath of public opinion, if sufficiently aroused.

Moreover, there is nothing we can find in the LMRA which curtails or regulates or postpones during a cooling-off period, a *minority* strike; and that field of regulation is left vacant.

2

No denial of due process.

The appellants claim that the strike-vote-election provision of the Michigan Act violates the due process clause of the Fourteenth Amendment by placing prior restraint on their right of free speech, free assembly, and free collective bargaining. But all rights are subject to reasonable regulation, and that is the only question here.

The short answer, of course, is that the Michigan statute places no check on free speech or assembly; it does not forbid Union officials or members of the labor organization to cease their advocacy of a strike or to persuade the employees to vote for a strike, and no one in a democracy can complain of this method of determining action of any kind.

Moreover, a minority strike-vote, when taken, does not end the matter, for there is no provision in the act, couched in mandatory terms, forbidding the advocacy of a strike, or the calling of a strike *after* such a vote has been taken.

All that the law of a sovereign State asks Labor to surrender for the welfare of the general public of Michigan, is the calling of a strike pending such an election.[59]

In *International Union v. Wisconsin employment Relations Board*, 336 U.S. 245, the same argument as to free speech and free assembly was advanced. This Court held that it was within the power of the State of Wisconsin,

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[59]

But appellants in this case did not await the results of an election to be held, and they have failed to show any injury other than the penalty incurred under § 22; as Mr. Justice Cardozo once said, 208 U.S. at 341, "To adopt a homely form of words, the complainants have been crying before they are really hurt".

under the Employment Peace Act of that State, to prohibit "work stoppages" by means of Union meetings called at irregular times during working hours, and said of the claim, 336 U.S. at 251:

> "It is further contended that the statute as applied invades the rights of free speech and public assemblage . . . We recently considered a similar contention in connection with other state action concerning labor relations. *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, . . . 335 U.S. 525, and *American Federation of Labor v. American Sash & Door Co.*, 335 U.S. 538. For reasons there stated, these contentions are without merit".

The decisions cited in this Court's opinion were handed down in what have come to be known as "Right-to-Work" cases, each sustaining a statute or Constitution protecting the right-to-work.

While Michigan's strike-vote-election law is not precisely like those of Arizona and Nebraska, nevertheless one of its underlying purposes is to protect the "right to work" in the face of an impending strike called by a minority.

We therefore respectfully submit that it constitutes a reasonable [not arbitrary] exercise of the police power of a State to protect by legislation such as this Court now has before it, the right of a majority of employees in an industrial plant, to continue to work although a minority of Union members has called a strike, to protect the general public from the evil effects of discord which follow in the wake of a minority strike, and to protect the inhabitants of the State from the dire results of unemployment. To us the subject does not seem to be debatable.

VIII

Conclusion.

It is respectfully submitted that the Michigan statute (a) does not invade a field which Congress has occupied, (b) does not conflict with the National Act, and (c) does not violate the due process clause of the Fourteenth Amendment. The judgment of the court below should be affirmed.

Respectfully submitted.

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